

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL ANDRE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

April 13, 2006

No. 257142

Wayne Circuit Court

LC No. 03-012150-01

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises out of the shooting death of Carl Russell Cotton at the parking lot of the Gold Star party store in Highland Park. Defendant first argues on appeal that the admission of witness Wayne Burton's identification testimony denied defendant his right to due process and a fair trial. Specifically, defendant argues that the in-court identification procedure was unduly suggestive because the police showed Burton a single photograph of defendant before Burton's investigative subpoena testimony and told Burton prior to the preliminary examination that defendant would be present in court. We disagree. Defendant failed to object at trial to the admission of Burton's in-court identification of defendant, and thus, we review this unpreserved issue for a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies a defendant due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To sustain a due process challenge, a defendant must show that the pre-trial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

In the instant case, two days after the incident, Burton attended a live lineup and immediately picked defendant out as the shooter. Burton stated that he had no doubt about his identification of defendant at the lineup. Because Burton unequivocally identified defendant as

the shooter at the lineup, it is unlikely that the subsequent showing of a single photograph of defendant or the confrontation of defendant at the preliminary examination led Burton to misidentify defendant at trial. *Kurylczyk, supra*, p 302. Accordingly, we hold that defendant's argument is without merit and that there was no plain error in the subsequent admission of Burton's identification of defendant at trial.

Defendant next argues that he was denied his due process right because the prosecutor violated discovery rules under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and Michigan law. Specifically, defendant argues that the prosecutor failed to disclose, prior to trial, evidence regarding Deputy Herlotha Fields' conversations with defendant at the scene. We disagree. The trial court's rulings concerning discovery are reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *Id.*

To prove a violation of the discovery rule under *Brady*, a defendant must prove: "(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). Similarly, in Michigan, MCR 6.201(B)(1) requires the prosecutor, upon request, to provide each defendant with certain information, including any exculpatory information or evidence known to the prosecuting attorney, any police report concerning the case and any written or recorded statements by a defendant. MCR 6.201(B); see *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). However, criminal defendants do not otherwise possess a general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000). A criminal defendant's due process right to discovery is implicated only with regard to evidence that is favorable to the defendant, exculpatory, or known by the prosecution to be false. *People v Tracey*, 221 Mich App 321, 324-325; 561 NW2d 133 (1997).

It was established at trial that, while looking for witnesses, Deputy Fields met defendant at the scene. When Deputy Fields asked defendant how he had learned about the shooting, defendant said that he received a phone call from a friend about the shooting while he was at a motel with a young lady. When Deputy Fields asked defendant for the name of his friend who called him, defendant said he did not know his friend's name or his phone number. Defendant also told Deputy Fields that he was the manager of the barbershop, Reggie's Ultimate Cuts. When Deputy Fields questioned him more about "Reggie," defendant said he worked for Reggie for two years, but did not know his last name. Deputy Fields placed defendant in the rear of a scout car for further interview with the detective. Deputy Fields did not write down his conversations with defendant in his police report.

Here, it is undisputed that neither the prosecution nor defendant's trial counsel were aware of Deputy Fields' conversations with defendant until the second day of trial.¹ After interviewing Deputy Fields regarding his proposed testimony, defense counsel moved to strike any of Deputy Fields' testimony regarding his conversations with defendant at the scene for failure to provide discovery prior to trial. The trial court found no basis to strike Deputy Fields' testimony in question, and we conclude this was not an abuse of discretion. Because Deputy Fields did not write down or otherwise record defendant's statements, the statements constitute observations not subject to mandatory disclosure under MCR 6.201(B). *Elston, supra*, p 762. Moreover, Deputy Fields' testimony that defendant gave him untruthful or implausible answers to his questions was not "exculpatory" under MCR 6.201(B)(1), or "favorable to an accused" under *Brady, supra*. *Elston, supra*, p 763. The fact that this evidence did not surface until during the trial does not rise to the level of a constitutional violation. *Id.*, pp 765-766, n 6. Also, defendant is unable to prove that he did not possess the evidence or could not have obtained it with reasonable diligence, since defendant could have told his counsel about his conversations with Deputy Fields. See *Lester, supra*, p 281. Accordingly, defendant's claim that his due process right was denied by the prosecution's violation of the discovery rule fails.

Defendant next argues that he was denied his due process right because the trial court erred in admitting into evidence testimony regarding a handgun recovered from the apartment of his girlfriend, Aminah Allen. We disagree. "The decision to admit evidence is within a trial court's discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). We will only reverse the trial court's ruling on the admissibility of evidence if the trial court abused its discretion. *Id.*

Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888, on second rem 242 Mich App 656; 620 NW2d 19 (2000). "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod, rem 450 Mich 1212 (1995). Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.*, pp 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

We agree with the trial court's decision to admit the handgun evidence. The witnesses identified the gun defendant used to shoot Cotton as a revolver and testified that the gun only fired four or five times. The autopsy of Cotton shows that he received five gunshot wounds. Thus, it is clearly relevant that the handgun in question was a five shot revolver and was

¹ As a participant in the conversation with Deputy Fields, defendant obviously had knowledge that he had made statements to the police.

recovered from Allen's apartment, who left the scene with defendant after the incident and who may have been his accomplice or accessory-after-the fact. MRE 401; *Crawford, supra*, p 388.

Moreover, the trial court did not err in ruling that the probative value of this evidence was not substantially outweighed by a danger of unfair prejudice under MRE 403. *Sabin, supra*, p 58. Given the overwhelming evidence showing defendant's guilt, including the evidence that defendant shot Cotton five times in the head and the body, that Cotton's blood was found on defendant's T-shirt and that gunshot residue was present on defendant's hands, Detective Roscoe Jackson's brief testimony that the handgun was found in Allen's apartment was not outcome determinative or prejudicial.

Finally, defendant argues that the prosecution presented insufficient evidence of premeditation and deliberation to support his first-degree murder conviction, and alternatively, that the great weight of the evidence does not support his conviction. We disagree. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). We must give deference to the jury's findings by determining all reasonable inferences and credibility choices in favor of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). An assertion that the great weight of the evidence does not support the verdict must be preserved by the filing of a motion for new trial under MCR 2.611(A)(1)(e). *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Because defendant failed to raise the "great weight" issue by a motion for new trial, the issue is waived, *id.*, unless the failure to consider the issue would result in a miscarriage of justice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

To convict a defendant of first-degree murder, the prosecution must prove that the defendant intended to kill the victim, and the killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). To prove premeditation and deliberation, the prosecution must show that the defendant thought about taking the victim's life beforehand and pondered and evaluated, for some appreciable though not specific amount of time, the major aspects of this choice before the act occurred. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). The elements of premeditation and deliberation require "substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill." *Id.*, p 301. The defendant must have had time to take a "second look" at his actions or "pause" between the thought and the action itself. *People v Abraham (In Re Abraham)*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *Plummer, supra*, pp 300-301. The jury can infer premeditation and deliberation from the circumstances as long as the inferences are supported from the record and are not merely speculative. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *Plummer, supra*, p 301. Moreover, because a killing occurred in an unexpected confrontation does not prevent a finding of premeditation and deliberation. *People v Gonzalez*, 178 Mich App 526, 532-534; 444 NW2d 228 (1989). In determining whether a defendant acted with premeditation, the trier of fact may consider (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *People v Moore*, 262 Mich App 64, 77; 683 NW2d 736 (2004).

We hold that the prosecutor presented sufficient evidence of premeditation and deliberation to support defendant's first-degree premeditated murder conviction. Specifically, a finding of premeditation and deliberation was supported by the circumstances surrounding the killing. *Kelly, supra*, p 642. The witnesses testified that, prior to the shooting, defendant argued with Cotton and Cotton told defendant not to show his gun or not to shoot him. Defendant and Cotton were standing approximately six to eight feet apart when defendant began shooting. After the first shot, Cotton fell down to the ground and defendant fired a couple of more shots at Cotton. After shooting Cotton at least three times, defendant stepped closer to Cotton and shot him several more times until he emptied the gun. When there were no more bullets in the gun, defendant hit Cotton in the face with the gun. The evidence supports the conclusion that defendant did not instantly or impulsively attack Cotton, or inflict the deadly wounds within only seconds. A reasonable jury could find that there was sufficient time for defendant to take a "second look" at the nature of his actions. *Id.*, p 642. It is also undisputed that Cotton received five gunshot wounds to his head and body, including one wound above the right eye and one wound to the middle of upper abdomen. The locations of the wounds indicate that the shootings were directed at causing death. Also, there was no evidence of a struggle, an attack by Cotton or any other occurrence that would prompt any unthinking use of the firearm. *People v Jones*, 115 Mich App 543, 553; 312 NY2d 723 (1982). Further, the existence of multiple gunshot wounds supports the conclusion that defendant had time in between each shot to contemplate his actions. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). For the same reasons we conclude that the verdict was not against the great weight of the evidence.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder